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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS GUTIERREZ, Defendant and Appellant.	B175361 (Los Angeles County Super. Ct. No. BA247389)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norm Shapiro, Judge. Affirmed as modified.

Barbara Springer Perry, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund. G. Brown and Bill Lockyer, Attorneys General, Dane R. Gillette and Robert R. Anderson, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Chung L. Mar and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Juan Carlos Gutierrez challenges his murder, robbery and attempted robbery convictions on the grounds the trial court committed numerous instructional errors, violated due process by imposing upper and consecutive terms on the basis of facts not found by the jury or admitted by him, and improperly imposed a gang enhancement. We conclude the trial court made several errors in relation to the aiding and abetting and accomplice instructions. However, the errors were harmless under the circumstances. The court also erred harmlessly by failing to instruct the jury upon the requirements for finding that a principal used or discharged a firearm for purposes of a Penal Code section 12022.53 enhancement. Moreover, the imposition of upper and consecutive terms did not violate due process. Finally, the trial court improperly enhanced appellant's sentence under Penal Code section 186.22.

BACKGROUND AND PROCEDURAL HISTORY

Appellant and a companion appeared at a party attended by his friend Emilio Perez, punched a guest in the face, and demanded money and jewelry from two guests who were with Perez on the porch. One of the guests handed over money and jewelry. Appellant told his companion to go get a gun and announced his intention to shoot the men on the porch. The two guests and the party host went inside to call the police, while Perez remained outside. When the men inside heard gunshots, Perez entered and called the police. According to Perez, appellant shot Edgar Canuto, who had been sleeping on the porch.

A jury convicted appellant of first degree murder, second degree robbery, and attempted second degree murder. It found that each offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. With respect to the murder, it further found that a principal used a gun, intentionally fired a gun, and intentionally fired a gun, causing death. Appellant was sentenced to prison for 65 years 8 months to life.

In September 2005, we issued an opinion affirming appellant's convictions and sentence. (*People v. Gutierrez* (Sept. 28, 2005, B175361) [nonpub. opn.]). Relying on *People v. Black* (2005) 35 Cal.4th 1238, we rejected appellant's argument that his right to a jury trial was violated by the court's finding of aggravating factors at sentencing.

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of its decision in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), which overruled *People v. Black, supra*, 35 Cal.4th 1238. Pursuant to the mandate of the United States Supreme Court, we recalled the remittitur, allowed supplemental briefing on the sentencing issue and issued and new opinion on August 25, 2008.

On September 8, 2008, appellant filed a petition for rehearing because the August 25, 2008 opinion erroneously held that appellant had waived his right to a claim a violation of *Cunningham*, *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In supplemental letter briefing, respondent concedes this issue. Appellant also requested that this Court reconsider its conclusion that there was no *Cunningham* error in appellant's sentencing.

DISCUSSION

1. The trial court erred harmlessly in relation to several of the accomplice and aiding and abetting instructions.

Abraham Martinez testified that after the party he was drinking on the porch of the party host's home with the host, Genaro Martinez, Perez and several other people. Abraham was drunk. Appellant and another man arrived. Appellant struck Abraham's face and demanded his money and rings. After Abraham handed them over to appellant, he went inside the house. While Abraham was inside, he heard gunshots. A person who was outside the house came inside and called 911. Afterwards, the person saw that a man who had been lying down asleep on the porch had been shot.

Genaro Martinez[1] testified that after the party he was drinking on the porch with Abraham, Edgar Canuto, Perez and others. Abraham and Perez began talking about gangs. Perez sang a rap song about gangs. Genaro told Perez neither he nor Abraham was a gang member and asked him to stop talking about gangs. Perez said he was formerly an 18th Street gang member. Genaro said he did not care and tried to change the subject. Perez said because they did not believe him, he was going to call his "homeys" to prove he formerly was a gang member. Perez went inside and used the phone. When he came out, he said his "homeys" were on the way. Five to seven minutes later, appellant and another man approached the house from the street. Appellant asked what was up and whether the people there had a problem with his "homeys." He then asked them where they were from. Genaro told appellant they were not gang members. Appellant beat Abraham and asked what the men had. Genaro said he had nothing, but appellant demanded "everything" from Abraham, who handed over his necklace, watch and rings. Appellant told his companion to go get a gun. He said, "We going to shot [*sic*] those motherfuckers . . . ." Perez told appellant to calm down and forget about it. Perez said he only called the men to prove that he was formerly an 18th Street gang member. Genaro went inside the house and told a woman who was there to call the police. While he was inside, Genaro heard shots. Perez came inside the house holding his side, acting as if he had been shot. Perez called the police. Genaro went outside and saw that Canuto was bleeding. Canuto had not argued with anyone. He was asleep the entire time.

Perez testified the party was thrown by his aunt. Although it ended around midnight, several people stayed around to drink. Perez sang and rapped. One of the men said he belonged to the Florencia gang. Perez replied that he belonged to the 18th Street gang. In actuality, he was not a gang member, but he knew gang members. The man did not believe him. Perez grabbed the phone and called a taxi for some friends, but he told

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[1] Genaro Martinez was apparently also known as Genaro Martinez Cruz.

the men at the party that he had called his "homeys" to come over. Appellant happened to walk past the house, and Perez called out to him. At appellant's preliminary hearing, while Perez testified he had called appellant to come over, that was not true. He so testified because he was angry with appellant. Appellant asked Perez whether the men at the party were gang members, and Perez said one of them claimed to be a member of the Florencia gang. Appellant twice asked the men where they were from, but they did not respond. Appellant punched one of them in the face and ordered the man to hand over his property. Appellant took everything from them, and then approached Perez's uncle and tried to take a chain from his neck. Perez intervened and appellant stopped. Appellant argued with the men. Perez asked appellant to give him a share of the property he had taken from the men. Appellant gave Perez a ring and departed.

Perez testified appellant returned to the house four or five minutes later with a gun. He asked Perez where his friends were, and Perez informed him they were inside the house. Appellant looked inside the house, and then saw Canuto sleeping on the porch. He said, "[Y]ou have so many friends here, I think I going [*sic*] to take revenge on this one." Appellant shot Canuto five or six times and ran away. Perez ran inside and called the police. Before they arrived, he gave the ring back to the man from whom appellant had taken it.

Perez further testified that he was charged with the same offenses as appellant. Under a plea agreement, he pled guilty to robbery and attempted robbery and admitted the truth of the gang allegation with respect to each offense. He received a suspended 15-year sentence and was placed on probation for five years. As part of his plea agreement, he promised to testify truthfully at appellant's trial.

Appellant argued at trial that Perez's testimony was false and that he was an accomplice, whose testimony should be viewed with caution. He also argued that the corroboration required for an accomplice's testimony was absent with respect to the murder charge. The prosecutor argued Perez was not an accomplice to the robbery or attempted robbery, as he did not know that appellant was going to beat or rob anyone; he

did not share appellant's intent, as demonstrated by his attempt to stop the robberies; and he did nothing to aid, promote or encourage the robberies. The prosecutor argued Perez's request for a share of the stolen property was insufficient to make him an aider and abettor because his intent was formed after the robbery was over. Alternatively, the prosecutor argued Perez had withdrawn from participating in the crimes by attempting to prevent appellant from robbing the men. With respect to the murder, the prosecutor argued that shooting Canuto was not a natural and probable consequence of robbery and attempted robbery. The prosecutor explained a deal was made with Perez because the prosecution needed his testimony, especially with respect to the identification of appellant, as Genaro and Abraham Martinez did not know appellant and had been drinking.

The trial court instructed the jury on aiding and abetting and accomplices, using CALJIC Nos. 3.00, 3.01, 3.02 with substantial modifications, 3.03, 4.21.2 with significant modifications, 3.10, 3.11, 3.12, 3.14, 3.18, and 3.19. Appellant contends several interrelated errors resulted from the use of these instructions and modified instructions, and from the failure to give other related instructions. We address the merits of each of appellant's contentions in turn.

a. Appellant was not entitled to an instruction that Perez was an accomplice as a matter of law with respect to the robbery and attempted robbery charges.

Appellant contends the trial court erred by failing to instruct the jury that Perez was an accomplice as a matter of law with respect to the robbery and attempted robbery charges. Appellant argues Perez's guilty plea to the same charges is entitled to collateral estoppel effect.

"Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) The court may only determine that a witness is an accomplice as a matter of law when the facts are clear and undisputed. (*People v.*

Rodriguez (1986) 42 Cal.3d 730, 759.)

Collateral estoppel, a doctrine embodied in the Fifth Amendment double jeopardy clause, bars re-litigation by the same parties of an issue of ultimate fact determined by a valid, final judgment. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443, 445.) An issue of ultimate fact is one that must be proven beyond a reasonable doubt. (*People v. Santamaria* (1994) 8 Cal.4th 903, 922.)

The California Supreme Court has consistently required the following elements for application of collateral estoppel: (1) the issue necessarily decided at the previous proceeding must be identical to the issue to be re-litigated; (2) the previous proceeding must have resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted must have been a party or in privity with a party at the prior proceeding. (*People v. Santamaria*, *supra*, 8 Cal.4th at p. 916.) Appellant bears the burden of showing that the issue he seeks to foreclose was actually decided by the jury. (*Id.* at pp. 920-921.)

Courts have not applied collateral estoppel to a conviction based upon a guilty plea. (*People v. Fuentes* (1986) 183 Cal.App.3d 444, 452-453; *People v. Camp* (1970) 10 Cal.App.3d 651, 653-654.) Collateral estoppel is based, in part, upon the " ' "public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." [Citation omitted.] "This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. [Citation omitted.] When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation.' " (*Id.* at p. 653.)

In *People v. Fuentes*, *supra*, 183 Cal.App.3d 444, it was undisputed that only one person fired the shots at the victim. One of two brothers charged with the shooting pled guilty to assault with a deadly weapon and admitted he had personally used a gun in the

commission of the crimes and personally inflicted great bodily injury. The second brother went to trial, was convicted of the same offense, and was found to have personally used a gun and inflicted great bodily injury upon the victim. On appeal, the second brother argued that collateral estoppel applied to bar his conviction for the personal gun use and personal infliction of great bodily injury enhancements admitted by his brother's guilty plea. (*Id.* at p. 449.) The appellate court deemed collateral estoppel inapplicable, stating that while it did not know the first brother's motive for pleading guilty, the plea prevented litigation of the identity of the shooter until the second brother's trial. (*Id.* at p. 452.) The court recognized "the seeming incongruity of imposing firearms use and great bodily injury enhancements on two defendants when factually only one of them can have been the shooter. However, inconsistent verdicts are not unknown in the criminal law. . . . Because Gregorio's conviction was based on a guilty plea, we see far less risk of exposing the criminal justice system to ridicule than would be the case if Gregorio had gone to trial." (*Id.* at pp. 452-453.)

Appellant argues the rule refusing collateral estoppel effect to a guilty plea must be reconsidered in light of the recent decision in *In re Sakarias* (2005) 35 Cal.4th 140 (*Sakarias*). There, the same prosecutor argued irreconcilably inconsistent factual theories in the separate jury trials of each accomplice in a murder. He attributed to each defendant certain lethal hatchet blows to the victim's head that could only have been inflicted by one person. He also refrained from eliciting in the second of the two trials testimony by the medical examiner that particular blows were inflicted postmortem. The Supreme Court held the prosecutor's conduct violated due process. "By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate 'the due process requirement that the government prosecute fairly in a search for truth . . . .' [Citation omitted.] In such circumstances, the People's conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually

innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we *know* that *someone* is factually innocent of the culpable acts attributed to both." (*Id.* at p. 160.) Appellant argues the prosecutor's conduct in his case also violated fundamental fairness because, after obtaining Perez's guilty plea in order to secure his testimony at appellant's trial, he disavowed Perez's guilt at appellant's trial in order to circumvent the rule that a conviction may not be based upon the uncorroborated testimony of an accomplice.

In the present case, however, the prosecutor did not rely upon irreconcilably inconsistent factual theories of culpability with respect to Perez and appellant. Unlike the *Sakarias* prosecutor, appellant's prosecutor did not attribute to both appellant and Perez an act only one of them could have performed. Both men could actually have participated in the robbery and attempted robbery. Nor did the prosecutor claim at appellant's trial that Perez played no role in the robbery and attempted robbery, but simply argued that he did not qualify as an accomplice. It appears, at most, that while the charges against Perez were unfounded, they were not irreconcilably factually inconsistent. Moreover, the jury was informed of Perez's guilty plea and heard testimony from Abraham and Genaro Martinez and Perez himself regarding his role in the events. Defense counsel was able to point out to the jury the inconsistency between the prosecutor's argument that Perez was not an accomplice and his conduct in charging Perez and taking his guilty plea. Accordingly, the concealment and deception practiced upon the jury by the *Sakarias* prosecutor was absent here. Given the distinctions between the nature and effects of the conduct of the prosecutors in this case and *Sakarias*, we conclude that *Sakarias* does not undermine the validity of precedent declining to give collateral estoppel effect to a conviction based upon a guilty plea.

As in *People v. Fuentes*, *supra*, 183 Cal.App.3d 444, we do not know why Perez pled guilty. He may have pled guilty because he actually shared appellant's intent and

participated in the robbery and attempted robbery to a greater extent than revealed by the evidence at appellant's trial. Alternatively, he may have pled guilty to unfounded charges because he was offered an opportunity to get out of jail, avoid the risk of conviction at trial, and receive probation. Whatever his motivation, his guilty plea left the issue of his status as an accomplice unlitigated until appellant's trial. It would have been error for the trial court to instruct the jury that Perez was an accomplice as a matter of law, as the facts regarding his participation and intent were not clear and undisputed.

In further reliance upon his collateral estoppel theory, appellant contends the trial court erred by instructing the jury it could consider Perez's voluntary intoxication in determining whether he had the requisite mental state to be an aider and abettor. (CALJIC No. 4.21.2.) Because Perez's guilty plea did not support the application of collateral estoppel, this contention has no merit.

b. Appellant was not entitled to an instruction that Perez was an accomplice as a matter of law with respect to the murder charge.

Appellant also contends that the trial court erred by failing to instruct the jury that Perez was an accomplice as a matter of law with respect to the murder charge. He first argues that because Perez was charged with murder, he had been "liable to prosecution" for the identical charge and was therefore an accomplice within the statutory definition in Penal Code section 1111.

"[L]iable to prosecution" means properly liable (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 759), not simply charged or prosecuted. Factual issues determinative of the witness's factual guilt of the offense must be "clear and undisputed" before the court can determine his status as an accomplice as a matter of law. (*Ibid.*) Therefore, the charges against Perez were insufficient to make him an accomplice as a matter of law. The facts regarding his criminal liability for murder were not adjudicated or admitted and were not undisputed, as illustrated by the arguments of counsel at appellant's trial.

Appellant also argues Perez was an accomplice to murder as a matter of law based upon Perez's own trial testimony. This contention fails because no evidence indicated

Perez shared appellant's murderous intent. At worst, Perez was present and failed to stop the murder, which is insufficient to impose criminal liability upon him. (*People v. Stankewitz* (1990) 51 Cal.3d. 72, 90.) In any event, the evidence of Perez's role, if any, in the murder, was not clear and undisputed, as would be required for an instruction that he was an accomplice as a matter of law.

c. The trial court erred by defining "accomplice" in a manner that excluded direct perpetrators.

Appellant contends CALJIC Nos. 3.10 and 3.14 improperly restricted the jury to finding Perez was an accomplice only if he was an aider and abettor, not the direct perpetrator of the murder. He argues the instructions were therefore inconsistent with the prosecutor's alternate theory that appellant was guilty as an aider and abettor and Perez as the direct perpetrator. Appellant argues that if the jury adopted the prosecutor's alternate theory, it would erroneously deem Perez was not an accomplice and would not evaluate his testimony in accordance with CALJIC Nos. 3.11[2] and 3.18[3]. Respondent denies that the prosecutor relied upon a theory that premised appellant's liability on aiding and abetting.

The prosecutor primarily argued to the jury that appellant shot Canuto and that Perez was not an accomplice, as he did not meet the knowledge, intent or act requirements to be an aider and abettor. However, in his opening and closing arguments, the prosecutor also argued that the jury could convict appellant of murder as an aider and

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[2] As given at appellant's trial, CALJIC No. 3.11 provided as follows: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect [the] defendant with the commission of the offense."

[3] As given at appellant's trial, CALJIC No. 3.18 provided as follows: "To the extent that an accomplice gives testimony that tends to incriminate [the] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it

abettor even if it found that Perez or appellant's companion shot Canuto. In this regard, the prosecutor argued that appellant "says to his buddy, he says, 'Go get a gun. We are going to shoot these motherfuckers,' a clear expression of his intent. [¶] Now, does this statement have independent legal significance? Well, let's look at it in regards to the law of aiding and abetting. 'Go get a gun. We are going to shoot these motherfuckers.' [¶] What happens if somebody says, 'all right,' goes and gets a gun, and shoots those 'motherfuckers'? You guilty? You bet you're guilty. You tell somebody, 'We are going to go get a gun and shoot somebody to death,' and they do it, you know what you are? You're an aidder [*sic*] and abetter. [¶] The purpose of committing a crime, that is, 'Let's go shoot somebody,' obviously, you are going to murder them, you intend to encourage the commission of the crime, and that's exactly what you just did; 'go get a gun. Let's go shoot these guys.' [¶] Advises, aids, prom[o]tes, or instigates. That's exactly what you just did. You promoted it. You encouraged it. You instigated it. [¶] 'Go get a gun. Let's shoot these guys.' [¶] If Emilio [Perez] goes and gets a gun, you know what? Defendant Gutierrez is guil[t]y of murder. If the other unknown guy goes and gets a gun, shoots him, you know what? Defendant Gutierrez is guilty of murder. And if defendant Gutierrez goes and gets a gun and shoots him, you know what he is guilty of? Murder. [¶] Legally, we don't care who got the gun. If one of those three guys, after being encouraged by defendant Gutierrez, commits this crime, under the law of aiding and abetting, any of them who shared in that knowledge and intent, equally guilty, all guilty of murder." The prosecutor then argued appellant, not Perez, was "the heavy in this operation," and appellant, not Perez, shot Canuto.

In his closing argument, the prosecutor argued appellant's exhortation to go and get a gun "at a minimum" meant appellant was "liable as an aider and abettor for murder." The prosecutor then argued that appellant, not Perez, shot Canuto: "[T]here is no way he shot and killed that guy. There is no way he pulled the trigger. [¶] That's

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deserves after examining it with care and caution and in the light of all the evidence in

defendant Gutierrez. Absolutely, that's defendant Gutierrez[.]"

Although the prosecutor clearly relied primarily upon a theory that appellant was the direct perpetrator in Canuto's murder, his lengthy discussion of appellant's exhortation to get a gun as the basis of appellant's liability on an aiding and abetting theory cannot be ignored. The prosecutor never told the jury he was not serious about that theory. Moreover, the prosecutor's return to the theory in his closing argument clearly indicated he in fact relied, to at least some extent, upon aiding and abetting as an alternate theory of appellant's guilt.

The trial court instructed the jury with CALJIC No. 3.00, which informed the jury that "[p]ersons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime." CALJIC No. 3.10, as given at appellant's trial, stated as follows: "An accomplice is a person who [was] subject to prosecution for the identical offense charged [in Count[s] 1, 2, & 3] against the defendant on trial by reason of [aiding and abetting]." The court also instructed with CALJIC No. 3.14, which states, "[m]erely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in, the commission of a crime without that knowledge and without that intent or purpose is not an accomplice in the commission of the crime."

CALJIC No. 3.00 effectively informed the jury that the set of persons criminally liable for an offense was divided into those who directly commit the offense and those who aid and abet in its commission. CALJIC No. 3.10 effectively told the jury that in

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this case."

order for Perez to fall within the category of persons labeled "accomplices," he must be an aider and abettor. It was reasonably likely that if the jury read these instructions together, as directed (CALJIC No. 1.01), it would conclude that if Perez was the direct perpetrator of the murder and appellant was an aider and abettor, as suggested in the prosecutor's alternate theory, Perez was not an aider and abettor, and therefore could not be deemed an accomplice. The jury would therefore not deem Perez a person whose testimony should be viewed with "care and caution," as directed in CALJIC No. 3.18 or whose testimony could not form the basis of conviction without corroboration, as directed in CALJIC No. 3.11. Accordingly, CALJIC No. 3.10 set forth an erroneous definition of "accomplice" in the context of the evidence produced and theories argued at appellant's trial.

As the error is akin to failing to instruct upon an element of an offense, we consider its prejudicial impact under *Chapman v. California* (1967) 386 U.S. 18, 24, i.e., the error is harmless if it appears beyond a reasonable doubt that it did not contribute to the jury's verdict. (*People v. Sakarias* (2000) 22 Cal.4th 596, 624-625; *Neder v. United States* (1999) 527 U.S. 1, 8-9.) With respect to the robbery and attempted robbery charges, the error was harmless beyond a reasonable doubt, as the victims' testimony fully established the commission of these offenses and corroborated Perez's testimony. There is no reasonable possibility the jury would have acquitted appellant of the robbery and attempted robbery if it were properly instructed that a direct perpetrator also qualified as an accomplice whose testimony was subject to suspicion and the requirement of corroboration.

With respect to the murder, these concerns regarding accomplice testimony would only apply if the jury found Perez were an accomplice to the murder. It could find Perez was an accomplice if it found he personally shot Canuto or it found he was an accomplice to the robbery and/or attempted robbery and Canuto's murder was a natural and probable consequence of the robbery and/or attempted robbery. As no evidence established or supported an inference that Perez shot Canuto, the jury would have to engage in sheer

speculation, in violation of the court's instructions to determine the facts from the evidence received, and not any other source. (CALJIC Nos. 1.00, 1.03.) The jury's rejection of allegations that appellant personally and intentionally used and fired a gun in the commission of the murder in favor of findings that a principal used and fired a gun do not establish that jury found appellant was not the direct perpetrator. They may be viewed as the product of compromise, confusion or an extension of leniency or mercy, "of which an appellant is not permitted to take further advantage." (Pen. Code, § 954; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657; *People v. York* (1992) 11 Cal.App.4th 1506, 1510.

If the jury found Perez was an accomplice to the robbery and/or attempted robbery, it would still have to find that the murder of Canuto was a natural and probable consequence of the robbery/attempted robbery. A particular criminal act is a natural and probable consequence of another criminal act if, under all of the circumstances presented, a reasonable person in the defendant's position would have known or should have known, that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) The jury was so instructed in CALJIC No. 3.02. Although assault with a deadly weapon and murder are often reasonably foreseeable consequences of an armed robbery or attempted armed robbery, nothing in the record indicated appellant or his companion was armed during the robbery and attempted robbery. Indeed, appellant's exhortation to go and get a gun strongly implies he was not armed at the time. Similarly, although confrontations between members of rival gangs often lead to fatal shootings, nothing in the record indicated Canuto was a member of a gang, and the undisputed testimony of all witnesses was that Canuto was asleep at all relevant times. Moreover, Canuto was not a bystander struck by gunfire aimed at a gang rival or a victim of or witness to the robbery and attempted robbery whose elimination would benefit the perpetrators. Under the circumstances of this case, there is no reasonable possibility that a properly instructed jury would have found Canuto's murder was a reasonably foreseeable consequence of the

robbery and attempted robbery of the Martinezes, even in light of the gang connotations presented by the evidence. Accordingly, the inadequacy of the instructions was harmless.

CALJIC No. 3.14 did not state or imply that direct perpetrators were excluded from accomplice status. It simply explained that unwitting participants in a crime did not constitute accomplices. Giving CALJIC No. 3.14 was not error.

d. The modifications of CALJIC Nos. 3.02 and 4.21.2 did not prejudice appellant.

The trial court modified CALJIC Nos. 3.02 and 4.21.2 to expressly refer to Perez. The version of CALJIC No. 3.02 given stated, "One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of [that crime] [those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted. In order for the witness Emilio Perez to be guilty under this theory of the crime of murder, [as charged in Count one,] it would have to be proven beyond a reasonable doubt that: [¶] 1. The crimes of robbery and att. robbery [were] committed; [¶] 2. That Emilio Perez aided and abetted [those] crime[s]; [¶] 3. That a co-principal in that crime committed the crime of murder; and [¶] 4. The crime of murder [was] a natural and probable consequence of the commission of the crime[s] of robbery and att. robbery. [¶] [In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen.] [¶] [You are not required to unanimously agree as to which originally contemplated crime Emilo [*sic*] Perez aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the [*sic*] Emilo [*sic*] Perez aided and abetted the commission of an identified

and defined target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.]"

The version of CALJIC No. 4.21.2 given provided that "[i]n deciding whether witness, Emilo [*sic*] Perez, is liable as an aider and abettor, you may consider evidence of voluntary intoxication in determining whether Emilo [*sic*] Perez as an aider and abettor had the required mental state. [However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the [target] crime.]"

Appellant contends the use of these modified instructions was error, as they were tailored exclusively to the theory that Perez was an aider and abettor, and did not address the prosecutor's alternate theory that Perez was the direct perpetrator and appellant was the aider and abettor. The unusual modification of these instructions to refer to Perez was inconsistent with the alternate theory that he was a direct perpetrator and appellant was an aider and abettor. However, the purpose of the two instructions was to guide the jury in determining whether Perez was an aider and abettor. Accordingly, they were inconsequential in determining whether Perez was a direct perpetrator. To the extent the modifications rendered CALJIC No. 3.02 inapplicable to appellant, he could only benefit, as the jury would not apply the natural and probable consequences doctrine to him to render him liable as an aider and abettor for a murder committed by someone else. Moreover, the prosecutor's theory regarding appellant as an aider and abettor was that appellant urged his friends to go and get a gun so they could shoot the men at the party. Under this view, appellant instigated or encouraged a single offense. The direct and target offenses were one and the same, and the natural and probable consequences theory was inapplicable. As there was no evidence that appellant was intoxicated, CALJIC No. 4.21.2 was factually inapplicable to appellant. He therefore was not prejudiced by the modification of the instruction.

Appellant argues the modification of the instructions may have permitted the jury to convict him as an aider and abettor without finding he possessed the requisite mental

state. However, the jury was properly instructed with CALJIC No. 3.01,[4] which set forth the elements of aiding and abetting without restriction to Perez. Accordingly, the jury knew that in order to find appellant was an aider and abettor, it was required to find he knew of the perpetrator's unlawful purpose and intended to commit, encourage or facilitate the commission of the crime. Accordingly, the modification of CALJIC Nos. 3.02 and 4.21.2 was harmless under any standard.

e. The modified version of CALJIC No. 3.02 improperly elevated appellant's burden of proof regarding Perez's status as an accomplice.

Appellant contends the modified form of CALJIC No. 3.02 erroneously informed the jury that his burden of proof that Perez was an aider and abettor -- and therefore was an accomplice -- was beyond a reasonable doubt.

The trial court properly instructed the jury that appellant bore the burden of proving by a preponderance of the evidence that Perez was an accomplice in the charged crimes. (CALJIC No. 3.19.) However, the modified version of CALJIC No. 3.02 twice stated that proof beyond a reasonable doubt would be required to find Perez was liable for murder as an aider and abettor under the natural and probable consequences doctrine. In pertinent part, the modified instruction stated that "[i]n order for the witness Emilio Perez to be guilty under this theory of the crime of murder, [as charged in Count one, it would have to be proven beyond a reasonable doubt that: [¶] 1. The crimes of robbery

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[4] CALJIC No. 3.01, as given at appellant's trial, provided as follows:

"A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she:

"(1) With knowledge of the unlawful purpose of the perpetrator, and

"(2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and

"(3) By act or advice aids, promotes, encourages or instigates the commission of the crime.

"[Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.]

"[Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]"

or att[empted] robbery [were] committed; [¶] 2. That Emilio Perez aided and abetted [those] crime[s]; [¶] 3. That a co-principal in that crime committed the crime of murder; and [¶] 4. The crime of murder [was] a natural and probable consequence of the commission of the crime[s] of robbery and att[empted] robbery." It further stated, "You are not required to unanimously agree as to which originally contemplated crime Emilo Perez aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that . . . Emilo Perez aided and abetted the commission of an identified and defined target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime."

Because CALJIC No. 3.10 informed the jury that Perez was an accomplice if he was subject to liability as an aider and abettor, the modified CALJIC No. 3.02 effectively told the jury that it could find Perez was an accomplice to murder under the natural and probable consequences doctrine only if it found proof beyond a reasonable doubt of the elements stated in the instruction. Even though CALJIC No. 3.19 stated the proper standard of proof, the modified CALJIC No. 3.02 impermissibly elevated appellant's burden of proof regarding Perez's accomplice status, making it more difficult for him to obtain the benefits of the instructions regarding corroboration and suspicion of accomplice testimony.

We nonetheless conclude the error was harmless, even under the more stringent standard set forth in *Chapman v. California*, *supra*, 386 U.S. at page 24. As noted previously, given the victims' testimony, there is no reasonable possibility the jury would have acquitted appellant of the robbery and attempted robbery had it been properly instructed. Indeed, because the error was contained in an instruction expressly limited in application to the murder charge, there is little likelihood the jury would have applied the higher burden of proof to its determination whether Perez was an accomplice to the robbery and attempted robbery charges. With respect to the murder, the instruction was applicable only if the jury found that Canuto's murder was a natural and probable consequence of the robbery/attempted robbery. For the reasons previously stated, there is

no reasonable possibility that a properly instructed jury would have found Canuto's murder was a reasonably foreseeable consequence of the robbery and attempted robbery of the Martinezes. Accordingly, the error was harmless.

f. The trial court erred by instructing the jury with CALJIC No. 9.40.2 instead of CALJIC No. 9.40.1.

The prosecutor characterized Perez's request to receive a portion of the robbery proceeds as after-acquired intent, and cited CALJIC No. 9.40.2, with which the court instructed. CALJIC No. 9.40.2 addresses the time when the perpetrator of a robbery is required form the specific intent to permanently deprive an owner of his property.[5] Appellant contends the trial court erred by failing to instruct that for purposes of determining aiding and abetting liability, a robbery continues until the proceeds have been carried away to a place of temporary safety.

An aider and abettor must form the intent to facilitate or encourage the commission of a robbery (and advise or act in a manner which aids, promotes, encourages or instigates the crime) prior to or during the asportation of the proceeds to a place of temporary safety. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.) A trial court should so instruct the jury. (*Id.* at p. 1170.) CALJIC No. 9.40.1 expresses this principle.

Although appellant did not request CALJIC No. 9.40.1 or a comparable instruction, the trial court has a duty to avoid giving legally incorrect instructions. CALJIC No. 9.40.2 was legally incorrect under the circumstances. The only evidence to which it was arguably responsive was Perez's late request to receive a portion of the robbery proceeds. However, because Perez was not the perpetrator of the robbery, CALJIC No. 9.40.2 stated an inapplicable principle of law. CALJIC No. 9.40.1 set forth

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[5] As given at appellant's trial, CAJLIC No. 9.40.2 provided, "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of [his] property before or at the time that the act of taking the property

the correct law with respect to Perez as a potential aider and abettor, and the trial court should have given it instead of CALJIC No. 9.40.2.

The instruction given, especially in light of the prosecutor's amplifying argument, would clearly tend to cause the jury to conclude Perez was not an aider and abettor, and therefore not an accomplice whose testimony was subject to suspicion and a requirement of corroboration. Nonetheless, the error was harmless for the reasons set forth in relation to the instructional errors previously addressed.

2. The trial court erred by failing to instruct upon a principal's use or discharge of a firearm, but the error was harmless.

The Information alleged that in the commission of the murder, appellant personally and intentionally fired a gun, causing great bodily injury and death; appellant personally and intentionally fired a gun; and appellant personally used a gun. (Pen. Code, § 12022.53, subds. (b)-(d).) It also alleged that a principal personally and intentionally fired a gun, causing great bodily injury and death; a principal personally and intentionally fired a gun; and a principal personally used a gun. (Pen. Code, § 12022.53, subds. (b)- (e).) Penal Code section 12022.53, subdivision (e) authorizes application of the enhancements set forth in subdivisions (b) through (d) without personal firearm use where a gang allegation under Penal Code section 186.22, subdivision (b) is pled and found true and any principal used a firearm as described in Penal Code section 12022.53, subdivisions (b) through (d).

The trial court instructed the jury with CALJIC Nos. 17.19[6] and 17.19.5,[7] which

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occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed."

[6] CALJIC No. 17.19, as given at appellant's trial, provided as follows:

"It is alleged [in Count one] that the defendant personally used a firearm during the commission of the crime charged.

address personal use and firing of a gun for purposes of Penal Code section 12022.53, subdivisions (b) through (d) enhancement allegations. While the court was reading the latter instruction to the jury, the prosecutor requested inclusion of a "principal armed" instruction. The court said it would do so the next day. After arguments, the court told the jury it was adding an instruction "which is very similar to an instruction I gave, but, nevertheless, I need to include it here, and it's 17.15." The court first re-read CALJIC No. 17.19, and then read CALJIC No. 17.15,[8] which addresses a principal armed

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"If you find the defendant guilty of the crime charged [or a lesser and included felony offense] murder second degree you must determine whether the defendant personally used a firearm in the commission of [that] [felony].

"The word 'firearm' includes [a handgun.]

"The term 'personally used a firearm,' as used in this instruction, means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

[7] CALJIC No. 17.19.5, as given at appellant's trial, provided as follows:

"It is alleged [in Count one] that the defendant intentionally and personally discharged a firearm [and caused [death] to a person] during the commission of the crime charged.

"If you find the defendant guilty of the crime thus charged, you must determine whether the defendant intentionally and personally discharged a firearm [and caused [death] to a person] in the commission of [that] [felony].

"The word 'firearm' includes [a handgun.]

"The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant [himself] must have intentionally discharged it.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

[8] CALJIC No. 17.15, as given at appellant's trial, provided as follows:

"It is alleged [in Count 1] that in the commission of the felony therein described, a principal was armed with a firearm, namely a handgun.

enhancement allegation under Penal Code section 12022, subdivision (a)(1). The Information did not include a Penal Code section 12022, subdivision (a)(1) enhancement allegation, and the jury was not given a verdict form requiring a finding on such an allegation. After reading CALJIC No. 17.15, the court again commented, "the point is they're very similar, but they are not the same. And when you do receive the verdict forms as to count 1, you will receive guilty and not guilty verdict forms for first degree murder, guilty and not guilty verdict forms for second degree murder. [¶] With the guilty verdict forms, there are a number of findings which you have to consider. If you find the defendant not guilty of murder in the first degree, not guilty of murder in the second degree, there are no findings that you have to make as to count 1. [¶] But if you do find the defendant guilty of either first or second degree murder, then you have to look at the findings and go through them and determine if they're true or not true. [¶] And these particular instructions go to several of the findings you will be required to make."

The jury asked no questions regarding the instructions or verdict forms. It found that the allegations that appellant personally and intentionally fired a gun, causing death; appellant personally and intentionally fired a gun; and appellant personally used a gun were not true. It found true, however, allegations that a principal personally and intentionally fired a gun, causing death; a principal personally and intentionally fired a

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"If you find a defendant guilty of the crime thus charged, you must determine whether a principal in that crime was armed with a firearm at the time of the commission of the crime.

"[A principal in the commission of a felony is one who either directly and actively commits or attempts to commit the crime or one who aids and abets the commission or attempted commission of the crime.]

"The term 'armed with a firearm' means knowingly to carry a firearm [or have it available] for offensive or defensive use.

"The word 'firearm' includes a pistol, revolver or any handgun.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"Include a special finding on that question using a form that will be supplied for that purpose."

gun; and a principal personally used a gun. It also found the Penal Code section 186.22, subdivision (b)(1) gang allegation true.

At sentencing, the trial court initially noted that the jury found the "principal armed allegations" true, but subsequently explained that it would enhance the sentence on the murder count by a term of 25 years to life "for the jury's finding on Penal Code section 12022.53 (d), that you discharged a firearm which caused death in this matter." The court's minute order and abstract of judgment cite Penal Code section 12022.53, subdivision (d) as authority for the enhancement imposed.

Appellant contends the trial court's remarks and the authority cited in the abstract of judgment and minute order indicated the court enhanced his sentence for his personal discharge of a firearm, causing death, which allegation the jury found not true. He further contends that because the court failed to instruct the jury on the use or discharge of a firearm by a principal, his sentence may not be enhanced for a principal's discharge of a firearm, causing death. (Pen. Code, § 12022.53, subd. (e).)

The Fifth and Sixth Amendments to the United States Constitution require that every criminal conviction rest upon a jury determination that the defendant is guilty beyond a reasonable doubt of every element of the charged crime. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510.) Absent a stipulation, this principle requires jury instructions informing the jury of the elements of the charged felony. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193.) Without the instructions, a jury would not possess the necessary information to find that every element of the charged offense had been established beyond a reasonable doubt. (*Ibid.*) Accordingly, the trial court has a sua sponte duty to instruct on all of the elements of the offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) These principles apply with equal force to an instruction upon the "elements" of enhancements. (*People v. Clark* (1997) 55 Cal.App.4th 709, 715.) However, the court need not give a requested instruction that is covered by other properly given instructions. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 675.)

The jury was not instructed on the requirements for finding that a principal

personally and intentionally fired a gun, causing death; a principal personally and intentionally fired a gun; or a principal personally used a gun. It was instead instructed on the requirements for finding that appellant personally performed those acts, upon the meaning of "principal," and upon the requirements for finding a different, uncharged enhancement true. Although the jury was told to read each instruction in light of all of the other instructions, it was essentially left to draw its own conclusion regarding the elements of the firearm allegations it found true. Moreover, the definitions of "principal" were provided in the context of CALJIC No. 3.00 and the inapplicable principal armed instruction (CALJIC No. 17.15). The trial court did not tell the jury to determine the truth of the allegations regarding a principal's discharge and use of a gun by substituting "principal" into CALJIC Nos. 17.19 and 17.19.5 in place of "defendant." Instead, the only reference to "principal" in regard to the firearm enhancements informed the jury it need only find that a principal was armed with a firearm. The court arguably compounded this error by twice telling the jury that CALJIC No. 17.15 was "very similar" to CALJIC No. 17.19. The two instructions are not similar, and the court's comments could reasonably lead jurors to believe that CALJIC No. 17.15 set forth the requirements for finding the "principal" firearm enhancements true, without the necessity of finding that a principal intentionally displayed a gun in a menacing manner, intentionally fired it, or intentionally struck someone with it, or that the intentional firing of the gun caused death. Accordingly, the court erred by failing to instruct upon the elements of the firearm enhancements under Penal Code section 12022.53, subdivision (e).

Where a court fails to instruct upon an element of an enhancement, other than one based upon a prior conviction, the error violates the federal constitution if the enhancement provision increases the penalty for the underlying crime beyond the prescribed statutory maximum. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) The effect of such an error is analyzed under *Chapman v. California*, *supra*, 386 U.S. at page 24. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 326.)

In light of the uncontradicted evidence that appellant shot Canuto, there was no reasonable possibility the jury would have rendered a different verdict had the trial court properly instructed it upon the elements of a principal's firearm use and discharge. As previously noted, the jury would have to speculate to conclude that Perez or appellant's unidentified companion shot Canuto. Although the jury was free to disbelieve Perez's testimony and acquit appellant, its verdict convicting appellant of murder demonstrates it found he was a principal in the commission of the murder. Because it was undisputed that someone fatally shot Canuto and nothing in the record suggested the shooting was accidental, it is clear beyond a reasonable doubt that a properly instructed jury would necessarily conclude that a principal personally and intentionally fired a gun during the commission of the murder, causing Canuto's death. Accordingly, the trial court's instructional error was harmless beyond a reasonable doubt.

The trial court's recitation of the correct findings on the firearm enhancement allegations at the start of the sentencing hearing indicates its subsequent reference to a finding "that you discharged a firearm" was a slip of the tongue. The citation of subdivision (d) of Penal Code section 12022.53 on the clerk's minute order and the abstract of judgment does not contradict this conclusion. The clerk should properly have cited subdivision (e) as well as subdivision (d) of Penal Code section 12022.53. The enhancement appellant received was the 25-years-to-life enhancement set forth in Penal Code section 12022.53, subdivision (d), which was applicable to him pursuant to subdivision (e). Accordingly, the abstract of judgment should be modified to refer to both subdivisions (d) and (e).

3. The imposition of upper and consecutive terms does not violate due process.

The trial court imposed the upper term of 5 years for robbery (count two), enhanced by a 10-year enhancement under Penal Code section 186.22, subdivision

(b)(1)(C).[9] It also imposed a consecutive term of eight months for count three (attempted robbery). The court explained that it found appellant's "relatively minor record" was the only mitigating factor, which was outweighed by the aggravating factors of appellant's predominant role in the robbery and the increasing seriousness of the crimes appellant had committed.

Citing *Blakely*, *supra*, 542 U.S. 296 and *Apprendi*, *supra*, 530 U.S. 466, appellant contends the imposition of the upper term for count two and consecutive terms for counts two and three violated due process, in that they were based upon facts found by the court, not a jury.

Apprendi, *supra*, 530 U.S. 466, essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Apprendi* explained that recidivism is distinguishable from other matters used to increase a sentence (1) recidivism traditionally has been used by sentencing courts to increase the length of a sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial procedural protections. (*Id*. at p. 488.)

Blakely, *supra*, 542 U.S. 296, clarified that the relevant " ' statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id*. at p. 303 original italics.) The key inquiry is whether the court had the authority to impose the particular sentence in question without finding any additional facts or only upon making some additional factual finding. (*Id.* at p. 305.) If any additional finding of fact is required, *Apprendi* applies. (*Ibid*.)

Cunningham, supra, 549 U.S. 270, held that California's Determinate Sentencing Law violates *Apprendi* to the extent it permits a trial court to impose an upper term based

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9 The propriety of the enhancement is addressed in the next section.

on facts found by the court rather than by a jury beyond a reasonable doubt.

In the wake of *Cunningham, supra*, 549 U.S. 270, the California Supreme Court held that "as long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been established in accordance with the requirements of Apprendi and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812.)

Moreover, the imposition of consecutive terms does not violate *Apprendi* or its progeny. (*People v. Black, supra*, 41 Cal.4th at p. 823.) The trial court relied upon one recidivism-type factor in its selection of the upper term, i.e., that appellant's convictions were of increasing seriousness. (*Id.* at pp. 819-820.) This factor supports the trial court's choice of an upper term, and the court's reliance upon the significance of appellant's role in the robbery is immaterial. (*Id.* a p. 812.)

4. The trial court improperly imposed a gang enhancement for count two.

The trial court sentenced appellant to five years in prison for robbery, and imposed a 10-year Penal Code section 186.22, subdivision (b)(1)(C) enhancement. Appellant contends the enhancement was barred by imposition of a life term and an enhancement under Penal Code section 12022.53, subdivision (e).

Respondent concedes the Penal Code section 186.22, subdivision (b)(1)(C) enhancement was improperly imposed and should be stricken. Respondent argues, however, that this court should impose the 15-year minimum parole eligibility term provided in Penal Code section 186.22, subdivision (b)(5).

Where an enhancement is imposed upon a defendant for a principal's use or discharge of a gun under authority of Penal Code section 12022.53, subdivision (e), no enhancement for participation in a criminal street gang may be imposed upon the defendant unless he personally used or discharged a gun in the commission of the offense. (Pen. Code, § 12022.53, subd. (e)(2).) The jury found untrue the allegations that appellant personally used or discharged a gun. Accordingly, the trial court's

imposition of the Penal Code section 12022.53, subdivision (e) enhancement precluded it from imposing any enhancement under Penal Code section 186.22.

Respondent's request to impose a 15-year minimum parole eligibility restriction essentially requests this court to engage in an idle act. After eliminating the improper enhancement, appellant's sentence is 55 years 8 months to life, without presentence conduct or postsentence worktime credits. This sentence renders him ineligible for parole for a period much longer than 15 years. In any event, it appears the imposition of the Penal Code section 12022.53, subdivision (e) enhancement would also preclude the 15-year minimum parole eligibility provision set forth in Penal Code section 186.22, subdivision (b)(5).

DISPOSITION

The enhancement for count two is stricken. The trial court is directed to issue an amended abstract of judgment omitting this enhancement and noting that the enhancement for count one was imposed under Penal Code section 12022.53, subdivisions (d) and (e). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.